UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE CONKLIN GROUP LLC, d/b/a
MASSAGE ENVY

and Case 15–CA–117947

SAMANTHA MANN, an individual

and Case 15–CA–119538

RACHAEL CANADY, an individual

Beauford D. Pines and Alexandra R. Schule, Esqs.,
for the General Counsel.
*Jason C. Taylor, Esq. (McConnaughhay, Duffy,
Coonrod, Pope & Weaver, P.A.)*,
Tallahassee, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Panama City, Florida on May 27–28, 2014. Based on timely charges filed by Samantha Mann and Rachael Canady, the General Counsel issued a complaint on February 26, 2014. The complaint alleges that The Conklin Group, LLC, d/b/a Massage Envy (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by terminating Canady and Mann on November 8, 2013,[2] several days after they engaged in protected concerted activities consisting of discussions about the Company's mandated sales percentages. The Company denies the allegations and asserts that Canady and Mann never engaged in protected concerted activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

[1] 29 U.S.C. §§ 151–169.
[2] All dates are in 2013, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Company, a limited liability company with an office and place of business in Panama City Beach, Florida, has been engaged in the retail sale of therapeutic massage services where it annually derives gross revenues in excess of $1,000,000, and purchases and receives goods valued in excess of $5,000 directly from points outside the State of Florida. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Conklin Group, LLC, d/b/a Massage Envy (the Company) is a massage clinic in Panama City, Florida that provides massages, facials, aromatherapy and other similar services (the Spa). The Spa is operated as a franchise of Massage Envy Spa, a national company. Lynny Conklin has owned the Company since its inception in 2008. She is involved in overseeing Company operations but is not at the Spa on a daily basis.

The Company places a great deal of importance on guest service and its employees are aware of the importance of providing a relaxing environment.[3] The Spa operates every day from 7:30 a.m. to 10 p.m. with the last massage appointment scheduled for 9 p.m. Approximately 65 to 100 massages are performed at the Spa daily. The Company employs approximately 40 people at any given time, including front desk sales associates, estheticians and massage therapists. The sales associates at the relevant time included Rachael Canady, Rodney Nabors, Andrea Vasquez and Andrew Newcomb. Duties performed by sales associates include answering phones, making appointments, and selling memberships and gift cards.

Karri Robles, the Spa's clinic administrator since March 2012, is primarily responsible for daily operations. Robles' job duties include interviewing, hiring and training employees, approving timesheets, and employee discipline.[4] She is assisted by Kortni Buchhalter, the Spa's assistant clinic administrator. Buchhalter's duties include interviewing, hiring, employee training, and administrative functions relating to customer service and member relations. She also has primary responsibility for gauging customer feedback and satisfaction through surveys submitted to Shared Insight, the Spa's third party contractor. Shared Insight transmits the surveys to the Spa's general email account on a daily basis and, if a survey contains negative feedback, Buchhalter usually prints it out when she reads it.[5]

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[3] It is not disputed that the Company's business relies on the quality of its client services. (Tr. 60–61, 100–101, 107–108, 200, 264, 278–279; R. Exhs. 7–9.)

[4] The evidence established that Robles managed and supervised daily operations, but Conklin remains involved by monitoring activities remotely.

[5] Buchhalter was fairly credible regarding her responsibilities and custom and practice (Tr. 22–23, 76–77, 105, 25, 213–215.)

1. Terms and conditions of employment

Sales associates and massage therapists have a target membership sales percentage of 25 percent, which increased to 35 percent at some point after November 2013. While the Spa has not terminated any employees for poor sales performance, sales percentages are a factor in employee performance reviews. Given the importance of sales to the franchise, Robles awarded all sales associates an hourly pay raise increase in April 2013 as motivation.[6]

Sales associates have access to the Spa's intranet to view its daily updated sales reports. The reports show a breakdown of membership sales percentage for each sales associate at the Spa. The Spa also receives regional sales reports that include data for 13 Massage Envy spas located within the Alabama/Florida Region. The Spa's sales are, on average, lower than other spas in the Region.[7]

2. The physical layout

The Spa's front desk has a number of computer stations and is located in an open space area that also includes a customer waiting area and the doors to a conference room and Robles' office. Until mid-2013, the conference room also doubled as Conklin's office.[8]

A hallway leads from the front desk lobby area to the massage rooms and employee break room in the rear. There are 14 massage rooms, a linen closet, and a private lounge for Spa members located along the hallway. Before Conklin's office was converted into a conference room, employees had access to her office. The conference room is usually used for employee online video training and locked. However, employees had access to it.[9]

Robles' office is located on the opposite side of the lobby area from the conference room. Her office contains employee files, lotions, creams, and other retail products used by massage therapists and estheticians. As such, employees frequently enter Robles' office to get creams, lotions, and other supplies needed in the course of their work.[10]

B. The Charging Parties

1. Samantha Mann

Samantha Mann, a licensed massage therapist with a B.S. Degree in Psychology, was initially hired by the Company as a sales associate on June 14, 2011. Between January 2012 and

[6] It is not disputed that sales production was a term and condition of employment. (Tr. 19, 44–47, 103, 125, 165, 272; GC Exhs. 8, 26, 27.)

[7] The fact that the Spa was in a tourist location and saddled with a transient customer market was inconsequential to its survival as a franchise. (Tr. 26–27, 43–44, 298.)

[8] GC Exh. 19.

[9] Canady testified that only Robles and Conklin had keys to the conference room. However, it was not disputed that employees were permitted use of the conference room in addition to the break room. (Tr. 40–42, 102, 109, 156–157, 266, 270–271, 297.)

[10] Robles conceded the free-wheeling access that employees had to her office during work hours. (Tr. 43, 102–103.).

April 2012, Mann was recognized for her productivity, excellent customer service and highest sales percentage. In November 2012, she assumed the duties of an assistant clinic administrator (ACA) and, on February 4, was officially promoted to the position.[11]

As the ACA, Mann assisted Robles in interviewing and hiring employees, and oversaw new employees' training. In Mann's June 13 employee performance review, Robles noted that Mann "[i]s an example to everyone around her with regards to upholding standards of Massage Envy business practices." Robles also noted Mann did a great job with professionalism, provided excellent and thorough guest service practices, and followed the Company's business practices and therapist Code of Ethics. Mann also received plaudits from customers in surveys.[12]

On June 21, Mann resigned the ACA position to focus on massage therapy. Mann worked only on Thursday, Friday and Saturday evenings.[13] She encountered some rough patches, however, and Conklin spoke with Mann on several occasions about how she expressed herself. This ultimately led to a written memorandum in which Mann was instructed to treat others with respect, even when she disagreed with them.[14]

2. Rachael Canady

Rachael Canady has an Associate Degree in Nursing Science. She began working as a sales associate on August 1, 2011. Canady's responsibilities included greeting customers, selling memberships, appointment scheduling, answering telephone calls, handling complaints, billing, assisting therapists, and training new front desk hires. She also tracked and updated sales data weekly for each employee in the spa's computer system, and used the sales data to update the sales board weekly to reflect the sales percentage for each employee. Canady typically worked only on Friday and Saturday 12 p.m. to 8 p.m., and occasionally Sundays.[15]

Canady had a good performance record and frequently performed extra duties. She had no specific disciplinary issues while employed by the Company.[16]

C. Canady's October 25th Conversation with Conklin

On Friday, October 25, Canady conversed with Conklin and Buchhalter in the front desk area of the Spa near Robles' office. Conklin said she recently attended the Massage Envy convention where she was informed that franchises would be required to maintain 25 percent membership sales. Conklin also told Canady to develop ideas for the upcoming Christmas party

[11] Mann was a fairly credible witness. (Tr. 162, 164–170; GC 3–4, 6–7, 9, 10.)
[12] GC Exh. 11.
[13] GC Exh. 12.
[14] (GC Exh. 13; Tr. 276–277.)
[15] Canady was also a credible witness. (Tr. 121–123, 282, 318–319; GC Exh. 24.)
[16] Robles testified Canady also received the increase because she performed extra duties, including membership suspensions and cancellations that were not performed by other sales associates. (Tr. 98.)

and think of ways to increase sales. Canady replied that she would think of ideas for the Christmas party and ways to achieve higher membership sales.[17]

D. October 27th Staff Meeting

On Sunday, October 27, Robles held a quarterly staff meeting in the Spa's front desk area lobby with about 35 employees, including Buchhalter, Mann and Canady. During the meeting, Robles distributed an agenda outline for the meeting. Robles also distributed a document to employees in which she reminded employees of the Spa's reliance on sales. Robles read the document, instructed employees to think of ways to become better consultants, and informed them that she would follow-up with each employee during the week, beginning November 4. Robles considered it acceptable for employees to complete their assignments at work.[18]

E. Mann and Canady's November 1st Conversations

On November 1, Robles spoke with Canady about numerous cancellations that Canady needed to process and billing issues and topics to be discussed at the upcoming staff meeting on November 3, which Canady would not be able to attend. Robles told Canady it would now be mandatory for all employees to have a 25 percent membership sales percentage to maintain their jobs. Robles also mentioned that Conklin wanted to discharge employees that did not maintain the requested productivity, but Robles wanted to prevent that. As such, she told Canady to come up with ways to increase the sales percentages. Canady agreed.[19]

Later that evening, Canady spoke with Mann in Robles' office. Sales associates Newcomb, Vasquez and Nabors were in the front desk area at the time. At about 7 p.m., Conklin utilized the Spa's remote video surveillance from her home and observed Mann and Canady hovering over Robles' computer.[20] Conklin called the office, Nabors answered and she told him to have Canady pick up the telephone. He complied, and she picked up the telephone. Conklin

[17] I credit Canady's testimony regarding the October 27 conversation. (Tr. 126–128; GC Exh. 19.) Conklin's testimony was evasive and did not deny making the statement that her franchise was in peril if staff failed to maintain 25 percent membership sales: "We had to strive to get to that 25 percent figure, because that membership-- that $20 . . . is what pays all the bills." (Tr. 272–273.)

[18] The substance of Robles' presentation was undisputed. (Tr. 70–73, 130–132, 175–177; R. Exh. 2A; GC Exh. 25.)

[19] I credit Canady's version of this conversation. (Tr. 132–134; GC Exh. 19.) Although she denied the existence of a sales target, Robles acknowledged discussing the need to increase sales productivity. (Tr. 76, 369.)

[20] In response to the General Counsel's subpoena duces tecum for a copy of the audio or video recordings during the evening of November 1, Robles testified that none existed. (GC Exh. 2; Tr. 243–245.) Conklin subsequently testified that the Spa's video recordings record over the tape after a period of time. (Tr. 292.)

then told that Mann needed to leave Robles' office and go back to a massage room. Mann, however, remained in the front desk area conversing with Canady for several more minutes.[21]

While Mann lingered in the front desk area, Canady sat at a computer station and checked emails of sales reports. Newcomb, Nabors, and Vasquez were at their computer stations at that time. Canady reviewed the report and commented about the sales percentage statistics of other Massage Envy spas in the region compared to their facility. She noted that the Spa's sales percentage was lower than other facilities because it is a tourist location with transient customers. Mann commented that only sales percentages, not tourist characteristics of their service area, mattered to Massage Envy's corporate officials. Canady added that Robles would explain at the staff meeting to be held the following Sunday that employees would be assigned 25 percent membership sales targets.[22] She also mentioned that Conklin and Robles had an employee termination list. Nabors, a relatively new employee concerned about job security, asked if he was on the list. Vasquez, seated nearby, also asked "who is getting fired?" Mann and Canady assured them that it was morning staff and they did not need to worry about it.[23]

Mann and Canady also levied criticism that Robles was not open to new ideas or operate the clinic properly. The conversation was loud enough to be heard by a client seated near the front desk area filling out paperwork.[24] The conversation lasted about 30 minutes and then Canady and Mann left the area to continue their conversation in a treatment room.[25]

During their subsequent discussion in a treatment room, Mann began generating a list to present to Conklin and Robles. The list included issues relating to the mandatory membership

[21] I credit Conklin's testimony that she observed Mann and Canady by Robles' computer on November 1. (Tr. 279–281, 286; GC Exh. 19.) While Nabors did not remember much about the time that the incident occurred or which other sales associates were working alongside him at the time, I found him credible on this point. (Tr. 311-313, 316–320, 333.) Mann and Canady, however, asserted that Conklin's directive was actually conveyed by Newcomb. (Tr. 135–136, 178–179.) I find that they were actually referring to a subsequent interaction with Newcomb when Conklin called back later and he went to get them in the back of the Spa.

[22] I credit the consistent and detailed testimony of Canady and Mann regarding this portion of the discussion regarding the sales report with Newcomb. They also conceded that there was a client in the front desk area during this time. (Tr. 138–139, 142; 180–182, 186; GC Exh. 19.)

[23] I base this finding on Nabors' credible testimony that he heard Canady mention a list of employees to be laid-off. (Tr. 317–322.) Mann and Canady, while denying that such a list was mentioned, provided corroboration in noting that Vasquez, who was seated nearby, asked who Canady was referring to as facing lay-offs. (Tr. 103, 143, 187.)

[24] I found Nabors assertion that the conversation was disturbing to be somewhat disingenuous given that he was an active participant in the discussion about sales targets and possible layoffs. (Tr. 320–321, 336, 339.) However, Mann and Canady confirmed there was a client in the front desk area during this time (Tr. 139, 181.), but it is not refuted that none was still there when they went to the back. (Tr. 187.)

[25] I based the finding as to the length of the conversation in the front desk area on Nabor's credible estimate of approximately 30 minutes. (Tr. 339.) Mann's estimate of "a few minutes" seemed too short for the discussion that ensued. (Tr. 181, 186.)

sales quotas, lack of health coverage and holiday pay benefits, unpaid work during lunch hours, and other work-related concerns.[26] At some point later on, Nabors was alone in the front desk area when Conklin again checked the office video and called him. Newcomb, who was primarily responsible for training Nabors, was not there at that time.[27] At her instruction, he walked to the rear of the office and saw Canady and Mann talking in a massage room.[28] Nabors said he was alone up front and needed help, at which point Canady went back to Robles' office to resume billing and Newcomb went to the front desk area with Nabors.[29]

F. Spa Activities on November 2nd

On November 2, the following day, the customer who overheard the employee conversation in the front desk area responded to a spa survey. The customer reported that the front desk staff was loud and unprofessional. The customer noted in the survey that when she entered the Spa and starting completing paperwork, she was distracted by front office staff engaging in an unprofessional loud conversation. The customer did not identify any particular employee in her survey. There had not been a prior survey reporting a complaint from a guest about the behavior of the front desk staff and that issue was significant to Robles.[30]

Canady reported to work at 12 p.m. on that day. Once she entered the spa, she spoke with Buchhalter in Robles' office. Buchhalter mentioned that several customer surveys came in and showed them to Canady. When she turned to the survey containing a customer complaint about loud and unprofessional staff behavior on November 1, Buchhalter told Canady to please mention to Newcomb to use his spa voice while he is in the clinic. In fact, Robles had spoken with Newcomb and other employees about loud conversation in the front desk area on several

[26] The testimony of Canady and Mann was not consistent as to whether they returned to work or continued their discussion elsewhere after their front area discussion. (Tr. 143–148, 158, 160, 183–184, 187–190.) Based on Nabors' partially credible testimony, I find that she and Mann went directly to the massage room and began to generate the list of issues to present to management. (GC Exh. 15–16.)

[27] It appears that Conklin was more concerned about Canady's whereabouts than Nabors being left alone, as she made no mention of Newcomb. (Tr. 281–282, 284–285, 313.) Nabors testified that Canady was responsible for his "supplemental training" during that time, but also omitted any mention of Newcomb. (Tr. 318–319, 335.) However, Robes testified that Nabors was supposed to be "shadowing" Newcomb. (Tr. 34, 37.).

[28] It is not clear when Newcomb and Vasquez left the front desk area, but the credible evidence indicates that Nabors was alone when Conklin observed him on video and called. (Tr. 281, 284–285, 322–325, 339.)

[29] The credible evidence indicates that Canady and Mann responded immediately to Nabor's relaying of Conklin's instruction. (Tr. 148–149, 318, 322–323.) That portion of Nabors testimony attributing culpability to Mann for a customer waiting in a treatment room or in the front waiting to be seen was not credible. Nabors was unsure about customer arrival and departure times and he failed to explain why, if a customer was waiting, he did not inform Mann, who then went to a break room. (Tr. 323–325, 338.) In fact, the appointment sheet referred to a different massage therapist with an appointment at that time. (R. Exh. 26; Tr. 257–258, 260, 329, 340, 344–345, 375, 377.)

[30] Robles' testimony that it was unusual for the Spa to receive complaints about front desk staff was not refuted. (GC Exh. 34; Tr. 104, 109, 367, 382–383.)

occasions.[31] Canady replied she would mention it to Newcomb and began working on membership cancellations in Robles' office. Subsequently, Buchhalter also spoke with Vasquez, Nabors and Newcomb and told them to minimize personal conversation in front of customers.[32]

G. Robles and Mann Meet on November 3rd

On November 3, Mann asked to meet with Robles about the workplace concerns and suggestions that she generated. Robles agreed and they met around noon in the conference room. During their meeting, Robles listened to Mann's suggestions, including improving sales, raises, holiday pay, break room use, paid time off, inconsistencies in evaluations, the disparity in gifts to sales associates but not massage therapists. When the meeting was complete, Robles and Mann both indicated it was a positive meeting and Robles had no negative concerns about the issues Mann raised.[33] Robles took notes during the meeting, noting at the outset that Mann "[w]ants to be a voice for all." Robles also noted Mann's comment that "[s]ales associates shouldn't feel like they will lose their job if sales aren't good." and paid time off.[34] During their conversation, Robles was not yet aware of the survey complaint received the day before.[35]

Mann followed up later in the day with additional suggestions in a text message to Robles. Mann also suggested that membership sales would improve if management responded positively to her ideas.[36]

Robles did not reply. Instead, she contacted Conklin and informed her of the discussions with Mann. Conklin then shared details of what she observed through video surveillance during the evening of November 1. Based on what she observed on November 1, coupled with Robles' report of her meeting with Mann on November 3, Conklin decided to terminate Mann and Canady.[37] At the time, however, Robles was unaware that she would be able to use the November 2 survey complaint as ammunition toward disciplinary action.[38]

[31] Robles did not distinguish between loud conversation in the past and on this occasion, except for the fact that the latest incident resulted in a survey comment. (Tr. 34–35.)

[32] Canady's credible testimony of her conversation with Buchhalter was not refuted by the latter. (Tr. 140, 216–217, 219, 221, 224, 231–232.)

[33] Given Robles note that Mann wanted to be a voice for other employees, I find that Mann specifically stated that she was speaking on behalf of other employees. (Tr. 82–84, 86, 90, 112, 116, 119–120, 170, 191–194, 204–205; GC Exh. 32.)

[34] GC Exh. 32.

[35] Robles conceded that she had no knowledge of the survey complaint before making the determination to terminate Mann and Canady. (Tr. 376.)

[36] Robles did not deny receipt of the subsequent text message. (Tr. 194–195.)

[37] I did not find Conklin's assertion credible that she was going to discipline them based solely on what she observed on video surveillance, as her intentions surfaced only after Robles reported the conversation with Mann. (Tr. 289.) Nor do I credit her testimony that she made the decision in conjunction with Robles. (Tr. 24, 293.)

[38] Buchhalter mentioned the November 2 survey complaining about loudness to Robles on November 3, but Robles did not review the survey at that time. (Tr. 24, 78–79, 289, 293, 301, 367–368, 382–383; GC Exh. 5.)

H. Robles Investigates Canady and Mann

On Monday, November 4, Nabors spoke with Robles about his concern of being terminated based on Canady and Mann's conversation on November 1.[39] After speaking with Nabors, Robles was also informed by Buchhalter that other employees were also concerned about possible termination.[40] Robles saw Mann later in the day and acknowledged receiving Mann's text message the day before, but did not mention her conversation with Nabors.[41] On Tuesday, November 5, Robles reviewed the customer survey about the staff being loud and unprofessional and found the evidence she needed to terminate Mann and Canady. Without speaking to Buchhalter for more details, she relied on Nabors' report that they told him and others of a termination list, Robles concluded that they were the employees that engaged in loud and unprofessional behavior in the front desk area during the evening on November 1.[42]

I. Robles Terminates Mann and Canady

A. The company's disciplinary policies and practices

The Company has an employee handbook that was applicable to employees in October and November 2013.[43] In addition, massage therapists sign a Massage Envy's Therapists Standards of Practice, which Mann signed on July 18, 2013.[44] The Company also follows a Massage Envy's Code of Conduct and Zero Tolerance Policy, updated July 2013.[45] The Therapists Standards of Practice prohibits employees, in pertinent part, from engaging "[i]nappropriate behavior or conversations in front of member/guest or sharing any negative information about the Clinic, its employees, or its members/guests."[46] Lastly, the spa had a policy regarding gossiping in the workplace.[47]

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[39] Based on the previous findings that Nabors was less than credible in complaining about loudness by Mann and Canady on November 1 and really concerned about the comments relating to job security, I find that he approached Robles on November 4, about the latter, as well as their criticism of Robles' management of the spa. (Tr. 78–79, 110–111, 326–327, 340–342, 362–366.)

[40] Given that Vasquez also heard the comments about a termination list on November 1, I find sufficient credible evidence to corroborate Robles testimony that other employees also became concerned. (Tr. 348, 362–363, 365–366.)

[41] I find that Robles did not mention Nabors' report because she was in the process of constructing rationales for terminating Mann and Canady and did not want to alert Mann to that. (Tr. 92, 195.)

[42] Robles' explanation as to how she determined that Mann and Canady were the loud culprits on November 1 was not credible and was gelled from Nabors' report of their termination list rumor. (Tr. 109.) There were at least three other employees in the front desk area at the time and neither of their names appeared in the survey; nor did she follow up with Buchhalter about the survey. (Tr. 221–223.) Moreover, there was insufficient and unclear documentary evidence establishing that Mann had any customer scheduled during that period of time. (Tr. 80–81, 111–112, 116, 380–381, 385.)

[43] GC Exh. 22.

[44] R. Exh. 9.

[45] R. Exh. 8.

[46] Robles acknowledged, however, that "inappropriate behavior or conversations" is not defined. (Tr. 50, 53–55, 56).

[47] R. Exh. 15.

The Company has a progressive disciplinary policy that typically starts with a verbal warning. Employees are normally given several warnings before being terminated.[48] While Conklin terminated employees in the past for inappropriate conduct in the massage rooms,[49] there was only one previous instance in which the Company implemented its progressive disciplinary policy against an employee for inappropriate conduct outside of the massage rooms. Nicole Jacob, an esthetician, was terminated on February 21, 2013. After receiving a warning earlier that day for bullying and threatening another employee, Jacob repeatedly interrupted Robles when the latter attempted to read the employee warning notice. That last straw, however, was preceded by three warnings, two final warnings and a 90-day probationary period, within the previous 3 months for insubordination, stomping, loudness and inappropriate conversation.[50]

B. Mann's termination

Prior to November 6, Mann was counseled once for accommodating a customer in contravention of the Spa's scheduling policies.[51] Otherwise, there were no other disciplinary records in her personnel file.[52] Nevertheless, without speaking with Mann or considering a lesser form of discipline, Conklin and Robles decided to move swiftly. On November 6, Robles notified Mann by email that she was terminated. Robles noted that Mann made disparaging remarks about Company management to others about the way the Spa is operated.[53]

Mann delivered a written response to Robles on November 13, noting her dismay at being terminating just 3 days after her meeting with Robles where they discussed employees' work concerns. She also sent an email to Massage Envy's corporate office recounting her treatment by the Spa. The corporate office responded and informed Mann that the Spa was independently owned and that it would forward Mann's letter to the Spa's owner.[54]

The subsequent personnel form filed with Massage Envy's personnel office stated that Mann was involuntarily terminated on November 6, for misconduct and not eligible for rehire.[55]

[48] The Employee Handbook does not refer to a progressive disciplinary policy. (GC Exh. 22.) However, Robles' testified that the Company had a policy of providing "[l]ots of warnings" before an employee would be terminated. (Tr. 49–50.)

[49] I credited Conklin's testimony that inappropriate behavior in the massage rooms was the reason why she initially installed video cameras. (Tr. 278.)

[50] The General Counsel did not question the Company's compliance with his subpoena duces tecum for the personnel and disciplinary records of employees who engaged in conduct similar to that of Mann and Canady. (GC Exh. 2; Tr. 244, 248, 354, 359, 371–372, 383–384; GC Exh. 38.)

[51] Robles conceded that Mann was actually commended by the customer and that the documentation was meant as a clarification of Mann's duties and not as discipline. (Tr. 171–173; GC Exh. 13–14.)

[52] Conklin, seemingly grasping at straws justifying her reason for taking the most drastic form of discipline, asserted that Mann was belligerent in staff meetings and once got physical with another therapist. (Tr. 276–277, 309–310). However, Mann was never disciplined. (Tr. 310.)

[53] GC Exh. 17.

[54] GC Exh. 20.

[55] GC Exh. 23.

C. Canady's termination

On November 8, Robles notified Canady by email that she was terminated. Robles noted that Canady spoke directly with sales team members and made disparaging comments regarding management and that such interaction with other employees was unacceptable. As in Mann's case, Canady's termination letter made no reference to a customer survey submitted on November 2.[56] Similarly, as with Mann, Robles had worked with Canady for over 2 years and considered her to be a very good productive and professional employee.[57]

Prior to termination, Canady had never received warnings or disciplinary actions during her employment by the Company. Nonetheless, in contravention of the Spa's progressive disciplinary policy, neither Robles nor Conklin ever considered lesser discipline.[58]

Canady followed up with a request to speak with Robles, but the latter would only agree to speak by telephone. During their telephone conversation on November 10, Canady asked for clarification. Robles explained that she was terminated for inappropriate conversation that made other employees uncomfortable, but made no reference to where the conversation took place.[59]

The subsequent personnel form filed with Massage Envy's personnel office stated that Canady was involuntarily terminated on November 6 for misconduct and was not eligible for rehire. However, the form submitted by Robles did not say whether she was eligible for rehire.[60]

LEGAL ANALYSIS

The General Counsel contends that the Company violated Section 8(a)(1) of the Act when it terminated Samantha Mann on November 6, and Rachel Canady on November 8, for engaging in protected conduct. The Company denies those allegations, and asserts that Canady and Mann's actions were not covered by the Act and that both employees were discharged for legitimate reasons based on the importance that the Company places on creating the proper environment and providing superior service for guests.

Section 8(a)(1) of the Act deems it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C. §158(a)(1). Section 7 of the Act gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." 29 U.S.C. § 157. Section 8(a)(1) of the Act therefore limits the manner in which employers may respond to activities protected by Section 7.

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[56] GC Exh. 28.

[57] Robles' concession on this point was further corroborated by an excellent performance review. (Tr. 97; GC Exh. 26.)

[58] The rationales relied upon by Robles and Conklin were contrived, inconsistent, unsubstantiated and all over the board. (Tr. 24, 55–56, 61–64, 76, 95, 100, 111, 152, 289, 293–294, 302–306, 308, 381–382.)

[59] I credit Canady's credible and detailed version of this conversation. (Tr. 99, 148–151.)

[60] GC Exh. 37.

In determining whether an employee's discharge violated the Act, the Board utilizes the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). To establish an unlawful discharge, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct motivated the employer to take adverse action against him. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). Discriminatory motivation may be shown by establishing an employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Donaldson Bros.*, 341 NLRB 958, 961 (2004); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Once the General Counsel has established a prima facie showing of unlawful motivation, the burden shifts to the respondent to establish that it would have discharged the employee for good cause regardless of his or her protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries, Inc.,* 341 NLRB 560, 563 (2004). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same actions absent the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995) *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

I. PROTECTED CONCERTED ACTIVITY

The Board construes "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management*." Myers Industries, Inc.* (*Myers I*), 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 971 (1985), and *Meyers Industries, Inc.* (*Myers II*), 281 NLRB 882 (1986), affd. Sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988). In order for a conversation to constitute concerted activity, "it must appear. . . engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Myers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d. Cir. 1964). Regardless as to whether group action is contemplated, discussions surrounding vital terms and conditions of employment are inherently concerted. See *Aroostook Cnty. Regional Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996) (stating that discussion of wages was inherently concerted because it was vital to employment).

A. Mann and Canady's November 1st Discussion

Mann and Canady began a discussion about concerns with sales percentages after the front desk computer and commented about the sales percentage statistics of other Massage Envy spas in the region compared to their spa. The discussion at the front desk included Mann and Canady, as well as fellow employees Nabors, Newcomb, and Vasquez. This discussion that engaged a group of employees met the definition of "concerted." *Meyers I*, 268 NLRB at 497. Concerted activity is protected if "there is a direct relation to employee's terms and conditions of employment." *In re Caval Tool Div.*, 331 NLRB 858, 863 (2000). Sales percentages directly relate to employee's terms and conditions of employment since the franchise's existence relies on them and they are factors in employee evaluations. The participation of multiple employees in a subject that is clearly a term and condition of their employment is protected under the Act. *Aroostook Cnty. Regional Ophthalmology Ctr.*, supra, 317 NLRB at 220.

The Company contends that the November 1st discussion in the front desk area was not protected because Mann and Canady informed coworkers about a nonexistent list of employees to be fired. The Company claims that these statements were false and, thus, not protected by the Act. This argument is not persuasive. False statements alone do not lose protection of the Act. *Wabeek Country Club*, 301 NLRB 694, 699 (1991), quoting *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (false and inaccurate employee statements are protected so long as they are not malicious). There was an absence of evidence that Mann and Canady made these statements with "reckless disregard for their truth or falsity" and, therefore, the statements cannot be construed as malicious. *In re Sprint*, 339 NLRB 1012, 1018 (2003).

B. Conversation Between Mann and Canady in Massage Room

After discussing issues of concern at the front desk in front of coworkers, Mann and Canady continued their conversation in a treatment room. During this conversation, Mann presented Canady with the list she created as well as other concerns expressed by coworkers concerning job conditions at the spa. This conversation was protected activity because, like the conversation at the front desk, it related to the employees' "terms and conditions of employment." *In re Caval Tool Div.*, 331 NLRB at 863. Changing the location of the discussion to take place in a more private setting does not remove its protection. This discussion between Mann and Canady in the massage room was a continuation of protected discussion that initiated by the front desk. *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (a phone call made to the Department of Labor by a single employee acting on her own volition logically grew out of employees' concerted efforts, and was therefore protected concerted activity).

C. Mann's Conversation with Robles on November 3, 2013

Mann's presented suggestions to Robles that were direct products of her conversations with coworkers. In *Meyers I*, the Board held that individual activity will generally be concerted only when it is "engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. Here, Mann approached Robles and discussed concerns as a "voice for all." Furthermore, when discussing sentiments, Mann referred to other employees and spoke in the collective ("we" rather than the singular "I.") In sum, her activity was not solely the product of personal dissatisfaction with management. Mann reached out to other employees, reviewed and revised a collective list of concerns of mutual interest of coworkers, and brought them to the attention of management. Her activity constituted protected concerted activity. *Meyers II,* supra, 281 NLRB at 887.

The Company contends that Mann's conversation with Robles was not protected concerted activity because Mann failed to announce that she was acting on behalf coworkers, and Canady did not request that Mann represent her regarding the list generated by their discussion. The evidence is clear, however, that other employees affected by the concerns, particularly sales associates, discussed those concerns. Some even complained. Furthermore, the credible evidence demonstrates that Canady knew that Mann would follow up with management about these concerns. The lack of formal organization or the fact that Mann was not officially appointed as a group spokesperson does not detract from the nature of her conversation as protected or concerted. *Salisbury Hotel*, 283 NLRB at 694 (a single employee protesting a change in a practice regarding lunch hour policy, particularly when other employees shared her concerns, constituted protected concerted activity even though she was not appointed as a spokesman).

II. COMPANY KNOWLEDGE OF PROTECTED CONCERTED ACTIVITY

There is compelling evidence that Conklin and Robles knew that Mann and Canady engaged in protected activity. Robles' notes from her conversation with Mann on November 3 evidences direct employer knowledge that employees were engaged in protected concerted activity. Furthermore, Robles was notified by Nabors and Buchhalter that concerns raised by Mann during the November 3 meeting were issues of mutual concern among employees that stemmed from conversations between Mann and Canady. Additionally, the video footage viewed by Conklin further reinforces that the Company was aware of the protected concerted conduct.

III. COMPANY ANIMUS

Motive and animus may be proven through indirect and circumstantial evidence. *Hewlett Packard Co.*, 341 NLRB 492, 498 (2004) (citing Sahara Las Vegas Corp., 284 NLRB 337 (1987)). The timing of the adverse action in relation to the protected activity, and evidence that demonstrates the employer's proffered explanation for the adverse action is a pretext may be used to show employer animus. *Baptist Med. Ctr./Health Midwest*, 338 NLRB 346, 377 (2002); *Tubular Corp. of America*, 337 NLRB 99 (2001); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Best Plumbing Supply*, 310 NLRB 143, 144 (1993); *American Cyanamid Co.*, 301 NLRB 253 (1991).

In Mann's case, she was known to complain and speak her mind. Conklin and Robles acknowledged this, yet they held her in high regard, guests spoke well of her and the most discipline she ever received was a reminder to respect others. In Canady's case, she had an exemplary service record, frequently performed extra duties, and had no disciplinary record. Despite both employees being regarded for their performance record and professionalism, they were still discharged without warning.

Suspicious timing alone may be sufficient to establish that animus was a motivating factor in a discharge decision. *Schaeff Inc.*, 321 NLRB 202, 217 (1996). The timing of the Company's actions against Mann and Canady singularly support an inferences of animus. The Company produced a memorandum instructing Mann to be respectful towards others, nothing more. In Canady's case, she was a model employee and was never reprimanded, much less counseled, for her performance. Such timing between protected activity and termination is a highly significant indication of unlawful, discriminatory motive for termination. The timing of Mann and Canady's discharge, coming around the time that Robles was notified of their engagement in protected concerted activities, followed by a myriad of unsubstantiated grounds for termination, clearly indicate that the Spa's reasons for discharging them was pretextual.

In addition to the suspicious and abrupt timing of their discharge, the Board has consistently held that the failure to conduct a full and fair investigation into alleged employee misconduct is evidence of discriminatory intent. *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). Here, no investigation was conducted prior to the discharge of Mann or Canady. On Monday, November 4, Robles learned of the discussion between Mann and Canady's about job concerns from Nabors and Buchhalter. On November 5, after reading a customer complaint of loud disruptive behavior, Robles concluded that Mann and Canady were the employees engaged in loud and unprofessional behavior on November 1. Robles arrived at such a conclusion without investigation and relied solely on Nabors' statement about the conversation concerning the

termination of employees and the client complaint. Robles' failure to further investigate whether Mann and Canady were the employees that engaged in loud and unprofessional behavior revealed that she did not assess the situation objectively. *Hewlett Packard Co.*, 341 NLRB at 498. Moreover, Conklin confirmed that nothing less than termination of Mann and Canady was ever considered, indicating that the Company's past policy was ignored.

IV. THE COMPANY'S BURDEN

The General Counsel established a prima facie case that Mann and Canady were discharged because they engaged in protected concerted activities relating to sales percentages, workplace conditions, and other terms and conditions of employment. As the Spa's stated grounds for both discharges was pretextual, it has failed to demonstrate that it would have taken the same action absent the protected conduct and, thus, there is no need to perform the second part of the *Wright Line* analysis. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

In any event, there is no evidence that the Company ever discharged an employee for misconduct in the same manner as Canady and Mann. The Spa's progressive disciplinary policy typically starts with a verbal warning, and employees are issued multiple warnings before being discharged. There is no evidence that such a policy was followed in the instant case. Furthermore, there is little consensus between Robles and Conklin as to why Canady and Mann were terminated. The Board has noted that employer's shifting explanation for discharging an employee is suggestive of pretextual reasons, and does not meet the burden that is placed on the employer to show that the employee would have been discharged regardless of protected activity. *Operating Engineers Local Union No. 3*, 324 NLRB 1183, 1187 (1997). The Spa did not prove it would have taken similar action absent the protected activity of Mann and Canady. Where an employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp.*, 151 NLRB 1328 (1965), enfd. sub nom. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (1966).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Samantha Mann on November 6, and Rachel Canady on November 8, because they engaged in protected concerted activities, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. The Company's unfair labor practices described above affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The Company, having discriminatorily discharged Samantha Mann and Rachel Canady, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Company, The Conklin Group, LLC, d/b/a Massage Envy, Panama City, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities relating to sales productivity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Samantha Mann and Rachel Canady full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Samantha Mann and Rachel Canady whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

[61] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Panama City, Florida copies of the attached notice marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since November 6, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 28, 2014

_____

Michael A. Rosas
Administrative Law Judge

[62] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities relating to sales productivity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Samantha Mann and Rachel Canady full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Samantha Mann and Rachel Canady whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Samantha Mann and Rachel Canady for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Samantha Mann and Rachel Canady, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

The Conklin Group, LLC, d/b/a Massage Envy

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-117947 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.